

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BAY WATCH REALTY TRUST,
Appellant

v.

MARION BOARD OF APPEALS,
Appellee

No. 02-28

11/22/04

ORDER CONCERNING JURISDICTION

This is an appeal that has been pending before the Housing Appeals Committee since 2002. A full evidentiary hearing has been conducted, with the last session concluding on November 18, 2004. Jurisdiction was established, in part, by a written determination of project eligibility issued in June 2001 by the Fall River Five Cents Savings Bank under the New England Fund of the Federal Home Loan Bank of Boston. The housing proposal is therefore a so-called "old NEF" proposal since the project eligibility determination preceded the July 22, 2002 effective date of regulatory changes to 760 CMR 31.01(2)(g) and 31.09(3). See 760 CMR 31.10.

The jurisdictional requirements in our regulations are quite specific. The proposed housing must "be fundable by a subsidizing agency under a low and moderate income housing program." 760 CMR 31.01(1)(b). Fundability, which is a threshold determination at the very beginning of the comprehensive permit approval review process, is established presumptively by submission of a written determination of project eligibility. 760 CMR 31.01(2), 31.07(1).

Generally, we are not to hear evidence concerning fundability other than evidence “as to the status of the project before the subsidizing agency.” 760 CMR 31.07(4)(a). That is, we are not to look behind the subsidizing agency’s determination and make our own determination. This is because fundability is a technical, administrative matter that is solely within the province of the subsidizing agency. Even if “there is some uncertainty about fundability, the Board or the Committee does not supplant the subsidizing agency and conduct a full review of these issues. ... [T]his approach... prevents the local board from becoming unnecessarily involved in issues which are not among the health, safety, and planning concerns enumerated in the statute, and yet provides additional protection to the local community which is unavailable when non-subsidized housing is being built.”¹ *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 8, 9 (Mass. Housing Appeals Committee Jun. 25, 1992); also see *Stoneham Heights Ltd. Partnership v. Stoneham*, No. 87-04, slip at 7, 29, 32 (Mass. Housing Appeals Committee Mar. 20, 1991)(appeal dismissed based on evidence presented voluntarily by the subsidizing agency).

One of the central aspects of the project eligibility determination has always been the suitability of the design of the proposed housing for the site under consideration. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 5 (Mass. Housing Appeals Committee Jun. 25, 1992).² In this case, at the second to last hearing session, the officer of the bank who issued

1. Effective August 31, 2001, for “new NEF” proposals, the provisions in our regulations requiring oversight by the subsidizing agency have been strengthened. That is, the requirements for project eligibility determinations in 760 CMR 31.01(2) have been made much more specific, and at the end of the process, prior to construction, the subsidizing agency is now explicitly required to issue “final written approval [of the proposal, which] shall, at a minimum, address each of the matters enumerated in [the project eligibility determination].” 760 CMR 31.09(3).

2. That specific requirement was codified by amendments to our regulations that were effective August 31, 2001. See 760 CMR 31.01(2)(b)(2) and 31.01(2)(b)(3).

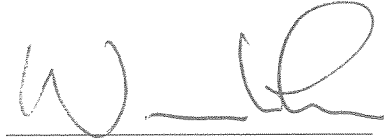
the project eligibility determination testified in detail concerning the procedures he followed. The evidence shows that at the time he issued the project eligibility determination, he did not have a site layout plan which would have allowed him to determine if the proposed housing design was appropriate for the site. Although we would not second-guess his judgment with regard to site suitability, since it is indisputable here that he could not have evaluated it at all in a meaningful manner, the project eligibility determination was clearly defective. Therefore, I find that the developer, Bay Watch Realty Trust, has failed to fulfill the fundability requirements of 760 CMR 31.01(b).

Pursuant to 760 CMR 31.01(5), I will grant the developer until February 17, 2005 to remedy this failure or the appeal will be subject to dismissal. The failure may be remedied by obtaining a new project eligibility determination pursuant to 760 CMR 31.01(2)(g). Such determination must comply with §§ 31.01(2)(a) and 31.01(2)(b). It need not comply with §§ 31.01(2)(c), 31.01(2)(d), and 31.01(2)(e), though the Board, the town, and the public may submit comments to the entity making the project eligibility determination (presumably the Massachusetts Housing Finance Agency) for consideration during the 30-day period required by 760 CMR 31.01(4). (The developer shall simultaneously serve upon the Board, or its counsel, copies of all applications and other correspondence sent to any subsidizing entity or reviewing entity.)

The evidentiary portion of this hearing is closed, and, pursuant to 760 CMR 30.09(5)(h), the hearing will terminate when briefs have been filed by the parties. If the developer receives a renewed determination of project eligibility and files it with the Committee, the Board will be permitted to file comments or a memorandum in response within ten days of the filing of the determination. Briefs on the merits of the full case on

appeal shall be filed within forty days of the filing of the renewed determination unless I
issue a superceding order establishing a different schedule.

Housing Appeals Committee

A handwritten signature in black ink, appearing to read 'W. Lohe', is written over a horizontal line.

Werner Lohe
Presiding Officer

Dated: November 22, 2004

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